

No. 75-1695

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MICHAEL RYAN, JR. CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1976

JAMES A. CARINI, ET AL., PETITIONERS

V.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FOURTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2a-7a) is reported at 528 F. 2d 738. The opinion and order of the district court (Pet. App. 9a-17a) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on December 19, 1975. A timely petition for rehearing was denied on February 23, 1976 (see Pet. App. 8a).¹ The petition for a writ of certiorari was filed on May 21, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

¹The order entered by the court of appeals denying the petition for rehearing was signed by the members of the panel on February

QUESTION PRESENTED

Whether, at the time they agreed to extend their enlistments in the United States Navy, petitioners acquired by contract or under the applicable statutes and regulations a vested right to the payment of "variable reenlistment bonuses."

STATEMENT

Petitioners are enlisted personnel in the United States Navy. At the time of their original enlistments, or shortly thereafter, petitioners agreed to extend their enlistments for an additional two years in order to qualify for training programs in electronics or some phase of nuclear operations. The extension agreements individually executed by petitioners provided, *inter alia*, that the extensions were "in consideration of the pay, allowances, and benefits which will accrue * * * during the continuances of [their] service" (Pet. App. 3a).

When petitioners executed their extension agreements, they apparently expected to receive from the Navy both a "regular reenlistment bonus" and a "variable reenlistment bonus" as they began to serve the extended periods of their enlistments.² But before petitioners had completed serving their original enlistments, Congress enacted the Armed Forces Enlisted Personnel Bonus Revision Act of 1974, Pub. L. 93-277, 88 Stat. 119 (Pet. App.

20, 1976 (Pet. App. 8a). It was not filed with the clerk of the court, however, until February 23, 1976; we are lodging with the Clerk of this Court a copy of that order bearing that filing date.

²At the times petitioners agreed to extend their enlistments, the Navy was authorized to pay such bonuses under the Act of September 7, 1962, Pub. L. 87-649, 76 Stat. 467, as amended by the Act of August 21, 1965, Pub. L. 89-132, 79 Stat. 547. The pertinent provisions of these statutes were codified at 37 U.S.C. 308, and are set forth at Pet. App. 125a-127a.

127a-130a).³ That Act eliminated both the regular and variable reenlistment bonuses provided under previously-existing law, and created a new bonus (commonly referred to as a "selective reenlistment bonus"), payment of which was conditioned upon the agreement of service personnel to extend their original enlistments by or to reenlist for three or four years. Although the Bonus Revision Act contained a savings clause protecting the eligibility of service personnel for a regular reenlistment bonus,⁴ it did not contain a savings clause protecting eligibility for variable reenlistment bonuses.

Petitioners subsequently filed a suit in the United States District Court for the Eastern District of Virginia, seeking writs of habeas corpus ordering the Navy to release them from the remaining portions of their service obligations (Pet. App. 9a). They later filed an amended complaint, seeking an order requiring the Navy to pay them the variable bonuses to which they believed they were entitled (*ibid.*) After hearing, the district court held that the statutory provisions providing for payment of a variable bonus were an integral part of the contracts that petitioners had executed when they agreed to extend their enlistments, that Congress' decision to replace the regular and variable bonuses with a new selective bonus system had been motivated primarily by fiscal concerns, and that Congress was without power to abrogate previously-existing contractual obligations for such reasons (*id.* at 11a-16a).

³The pertinent provisions of the Bonus Revision Act are codified at 37 U.S.C. (Supp. V) 308 and 308a, and are set forth at Pet. App. 127a-130a.

⁴Section 3 of the Bonus Revision Act, Pub. L. 93-277, 88 Stat. 121; Pet. App. 130a.

The court of appeals reversed, explaining in part (Pet. App. 5a):

While the district court reasoned that the 1965 statute became a part of the reenlistment agreement[s], we think it did not. Those agreements were said to be in consideration of the "pay, benefits and allowances which will accrue." There is no reference to a VRB [variable reenlistment bonus]. Indeed, there is no specification at all of what pay will accrue. On its face, it seems to us to mean that the enlistee will receive the pay authorized by statute and regulation from time to time as he performs his service. Indeed, the [petitioners] concede that the monthly salary they receive was not fixed at the rates in effect at the time of the contracts. It is subject to the unfettered control of the Congress. The Supreme Court has said that "a soldier's entitlement to pay is dependent upon statutory right" [quoting from *Bell v. United States*, 366 U.S. 393, 401].

ARGUMENT

The decision in this case conflicts with the decision of the Court of Appeals for the District of Columbia Circuit in *Larionoff v. United States*, 533 F. 2d 1167. In *Larionoff*, the court of appeals held that enlisted members of the United States Navy acquired a vested right to the payment of variable reenlistment bonuses at the time they agreed to extend their original enlistments. The court further held that that right could not be altered by changes in the regulations governing the administration of the variable bonus program or by statutory changes not made pursuant to some paramount constitutional power such as that contained in the War Powers Clause.

The Solicitor General has authorized the filing of a petition for a writ of certiorari to review the court of appeals' decision in *Larionoff*.⁵ The conflict between the decisions in *Larionoff* and in this case has created significant administrative problems for the Navy, encourages forum shopping, and promises to result in substantial additional litigation. As noted by petitioners (Pet. 7, 11-12), the issue presented here is now before two other courts of appeals⁶ and has also been raised in numerous suits pending in various federal district courts.

CONCLUSION

For the foregoing reasons, we do not oppose the granting of the petition for a writ of certiorari in this case.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

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⁵By order of August 17, 1976, the Chief Justice extended the time for filing a petition for a writ of certiorari in *Larionoff* to and including September 26, 1976.

⁶On July 30, 1976, the Court of Appeals for the Second Circuit entered an order in *Caola v. United States*, Civil Action No. 76-2052, extending the time for filing the government's brief on appeal to and including October 29, 1976. But the court expressly provided in its order that the briefing schedule it had set was subject to change depending upon this Court's disposition of the petitions filed in the present case and in *Larionoff*.